Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS,
CLERK

80-1707

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

LEVERAGE FUNDING SYSTEMS, INC.,
a corporation,
CENTAUR FILMS, a corporation,
PETER S. TRAYNOR, an individual,
WILLIAM G. McDONALD, JR.,
an individual,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD H. KIRSCHNER, Esq.
PAUL FITZGERALD, Esq.

RICHARD H. KIRSCHNER,
A Professional Corporation

10850 Wilshire Boulevard
Fourth Floor
Los Angeles, CA 90024
(213) 474-6555

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether a grand juror may cast a valid vote without having heard any evidence whatsoever?

2. Whether the Ninth Circuit's failure to establish any standard requiring attendance by grand jurors at grand jury sessions renders meaningless the constitutional requirement that an indictment be returned by an informed grand jury?

3. Whether the Ninth Circuit's holding that prosecutors are not required to present to the grand jury exculpatory evidence in their possession deprives the grand jury of its historic function of protecting the innocent against unfounded and malicious prosecutions?

TOPICAL INDEX

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION	1
OPINION BELOW	2
JURISDICTION	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	13
A. The Majority's Failure to Establish Any Standard Requiring Attendance by Grand Jurors at Grand Jury Sessions Renders Meaningless the Constitutional Requirement That an Indictment be Returned by an Informed Grand Jury.	16
B. The Majority's Holding That Prosecutors Are Not Required to Present to the Grand Jury Exculpatory Evidence in Their Possession Deprives the Grand Jury of its Historic Function of Protecting the Innocent Against Unfounded and Malicious Prosecutions.	27
CONCLUSION	31

TABLE OF AUTHORITIES

	Page
Cases	
Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194 10 L.Ed.2d 215 (1963)	30
United States v. Braniff Airways, Inc. 425 F.Supp. 579 (W.D. Tex. 1977)	31
United States v. Calandra 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)	16, 21
United States v. Chanen 549 F.2d 1306 (9th Cir.) cert. denied, 434 U.S. 825 (1977)	19, 20
United States v. Ciambrone 601 F.2d 616 (2nd Cir. 1979)	26, 30
United States v. DeMarco 401 F.Supp. 505 (C.D. Ca. 1975), aff'd on other grounds, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977)	31
United States v. Gold 470 F.Supp. 1336 (N.D. Ill. 1979)	30

	Page
United States v. Leverage Funding Systems, Inc. 637 F.2d 645 (9th Cir. 1980)	2, 6, 8, 19
United States v. Leverage Funding Systems, Inc. 478 F.Supp. 799 (C.D. Ca. 1979)	2, 7, 17, 18
United States v. Mandel 415 F.Supp. 1033 (D. Md. 1976)	31
United States ex rel. McCann v. Thompson 144 F.2d 604 (2nd Cir.) cert. denied, 323 U.S. 790 (1944)	22, 23, 24, 25, 26
United States v. Olin 465 F.Supp. 1120 (W.D. N.Y. 1979)	31
United States v. Phillips Petroleum Co. 435 F.Supp. 610 (N.D. Okla. 1977)	31
United States v. Roberts 481 F.Supp. 1385 (C.D. Ca. 1980)	20, 30
United States v. Virginia Erection Corp. 335 F.2d 868 (4th Cir. 1964)	21

Page

United States v. Y. Hata & Co.
535 F.2d 508 (9th Cir.) cert. denied, 429 U.S. 828 (1976) 28

Wood v. Georgia
370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962) 10, 23

Rules

Federal Rules of Criminal Procedure:

Rule 6(e)(1) 24

Rule 6(f) 3

Texts

United States Attorneys Manual § 9-11.334 28, 29

American Bar Assn. Standards for Criminal Justice Relating to the Prosecution Function (2d Ed. 1980) § 3-3.6 29

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

LEVERAGE FUNDING SYSTEMS, INC.,
a corporation,
CENTAUR FILMS, a corporation,
PETER S. TRAYNOR, an individual,
WILLIAM G. McDONALD, JR.,
an individual,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD H. KIRSCHNER, on behalf of LEVERAGE FUNDING SYSTEMS, INC., CENTAUR FILMS, PETER S. TRAYNOR and WILLIAM G. McDONALD, JR., petitions for a Writ of Certiorari to review the judgment of

the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 637 F.2d 645 (9th Cir. 1980). The reversed District Court opinion is found at 478 F.Supp. 799 (C.D. Ca. 1979).

JURISDICTION

The judgment of the District Court dismissing the indictment was entered on October 17, 1979. A divided appellate court opinion reversing was filed on October 3, 1980. A petition for rehearing and suggestion for rehearing en banc was denied on February 27, 1981; the mandate was stayed until March 25, 1981.

STATEMENT

On February 27, 1979, a 29 count indictment was filed charging violations of the mail and securities fraud statutes. On September 5, 1979, defendants filed a motion to dismiss the indictment based upon irregularities which occurred before the grand jury alleging, inter alia, that the indictment was not properly founded upon the concurrence of 12 or more grand jurors as required by Federal Rules of Criminal Procedure, Rule 6(f). The grand jury which returned the indictment in the instant case met 13 times to hear and consider evidence. Prior to the commencement of this investigation, 23 members of the grand jury were impaneled. Only 9 of the grand jurors attended each of the sessions and heard all

of the evidence presented to the grand jury. 19 jurors were in attendance on the date the indictment was returned. However, at no time during the grand jury proceedings did the prosecutor make available to jurors who were absent for particular sessions transcripts of the testimony which they missed. Nor were absentee grand jurors provided with summaries in any form of missed testimony.

On October 17, 1979, former District Court Judge Harry Pregerson issued an order dismissing the indictment because less than 12 grand jurors were informed of all of the evidence presented to the grand jury.

In an opinion rendered by a majority of the 3-judge panel [1] of the Ninth Circuit Court of Appeals, basic constitutional rights of persons who are the subjects of grand jury investigations have been gravely endangered. The majority opinion holds that a grand juror may cast a valid vote without having heard or been informed of any evidence. The opinion would permit an individual to validly be indicted by the concurrence of 12 grand jurors, 7 of whom heard no evidence whatsoever. For example, if a grand jury consists of 23 persons and meets numerous times, and 16 persons are present during each

---

1/ The majority consisted of Circuit Judge Jerome Farris and Sr. District Judge William J. Jameson, sitting by designation. Circuit Judge Dorothy W. Nelson dissented from the majority opinion and adopted Judge Pregerson's decision in total.

session, but on the day of the vote, the 16 present consist of 7 members who did not attend any of the previous sessions, those 7 may nevertheless validly vote to return the indictment. The majority has held that an indictment is valid if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors; (2) every grand jury session was attended by at least 16 grand jurors; and (3) at least 12 grand jurors voted to indict. (At p. 648.) The majority has concluded that grand jurors voting an indictment need not attend every session of the grand jury, and that grand jurors may fulfill their constitutional role in determining whether the prosecution has presented a prima facie case even if they were absent during the presentation of exculpatory evidence. (At p. 648.)

Surprisingly, the majority has not required grand jurors who vote upon federal indictments to become informed of evidence presented to the grand jury during sessions at which grand jurors were absent.

A simple and practical standard for grand jury attendance would have been established if the panel had affirmed the decision of the District Court in United States v. Leverage Funding Systems, Inc., 478 F.Supp. 799 (C.D. Ca. 1979). Former District Court Judge Harry Pregerson held that, in order for an indictment to be valid it must have been returned by at least 12 grand jurors who became informed of the evidence presented during the course of an investigation by attending every grand jury session at which evidence was presented on the proposed indictment. The

indictment at bar was dismissed because it was returned by fewer than 12 grand jurors who had attended all grand jury sessions at which evidence was presented.

It should be noted that the District Court's opinion was adopted by the dissenting member of the panel which decided the appeal.

In reversing the judgment of the District Court, the majority has concluded that the prosecution has no duty to present to the grand jury exculpatory evidence within its possession, and therefore assumes that no exculpatory evidence will in fact be presented to the grand jury. (At p. 648.) The Court thus concludes that since the grand jury will receive only inculpatory evidence, a grand juror may properly vote an indictment even though he or she has not been present to hear

and consider relevant and critical evidence that may have been presented to the grand jury. The majority appears to ground its opinion upon the belief that the function of the prosecution is merely to present evidence of guilt, not withstanding the prosecutor's knowledge of evidence that negates guilt. The majority therefore concludes that a grand juror who does not consider the prosecution's entire presentation, but who is nevertheless satisfied that the Government has established probable cause that the subject of the investigation has committed a crime, may properly vote an indictment.

The decision thus overlooks the historic role of the grand jury in our judicial system to provide a shield against hasty, unwarranted, malicious

and unjustified criminal prosecutions. As the United States Supreme Court has eloquently described the Federal Grand Jury:

> "It serves the invaluable function in our society of standing between the accusor and the accused, . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal illwill."
> Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962).

In failing to establish any standard whatsoever for grand jury attendance, the majority invites the possibility that the grand jury's vital function of protecting citizens from unwarranted prosecutions may be destroyed, and that the grand jury may be reduced to acting as a rubber stamp for the Government.

Moreover, in suggesting that the prosecution has no duty to present

exculpatory evidence, the majority has further placed in serious jeopardy the power of the grand jury to protect against unfounded prosecutions. In reaching this decision, the majority has overlooked the directives of the United States Department of Justice, the policies of the American Bar Association, and well-reasoned judicial decisions, all of which require that prosecutors present to a grand jury evidence in the prosecutions's possession which negates guilt.

The majority's conclusion that grand jurors can perform their duties without having heard exculpatory evidence which was presented to the grand jury appears to be based upon the further assumption that it is not the function of the grand jury to weigh evidence. However, it is difficult to

envision how the grand jury can determine whether there exists probable cause unless it evaluates and weighs all of the evidence presented to it which either supports or negates guilt. If the grand jury's role were merely to consider some evidence of guilt, without weighing it against evidence of innocence, the grand jury's traditional function of standing between the accusor and the innocent accused would be a hollow mockery.

Due to the important effect of the majority's decision upon the administration of justice, particularly in the conduct of grand jury proceedings, it is urged that the issues presented by this petition and the majority's decision be considered by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

By holding that grand jurors are not required to attend all sessions at which evidence of either guilt or innocence is presented to the grand jury, the majority gravely jeopardizes the constitutional guarantee that an indictment be returned by an informed grand jury. The Appellate Court's decision means that grand jurors may vote an indictment without having heard or considered any evidence of guilt. The majority's opinion thus undermines the vital role of the grand jury in shielding the innocent against unjustified prosecutions.

The majority also concludes that a prosecutor has no duty to present to the grand jury evidence in the prosecution's possession which negates guilt,

and therefore assumes that exculpatory evidence will rarely be presented to the grand jury. However, the majority's conclusion overlooked the strong trend -- led by the United States Department of Justice and the American Bar Association -- toward requiring prosecutors, in the interest of justice, to present exculpatory evidence to the grand jury. Instead, the majority has established a standard below that set by the Department of Justice for its employees and inconsistent with the official policies of the American Bar Association. The majority's standard is also lower than that set by other courts which have considered the injustice which may result when a grand jury returns an indictment without having considered evidence in the prosecution's

possession which negates the guilt of the accused.

Finally, the majority's statement that grand jurors need not hear exculpatory evidence, on the ground that it is not their function to weigh evidence, is not consistent with the grand jury's function of determining probable cause. It is only by weighing and evaluating all of the evidence of both guilt and innocence received by it that a grand jury can properly determine whether there is probable cause that the accused has committed a crime. Without having heard and considered all of the evidence presented to the grand jury, grand jurors cannot perform their constitutional function of protecting the innocent against unfounded prosecutions.

A. The Majority's Failure to Establish Any Standard Requiring Attendance By Grand Jurors at Grand Jury Sessions Renders Meaningless the Constitutional Requirement That an Indictment be Returned by an Informed Grand Jury.

If the Fifth Amendment guarantee of indictment by an informed grand jury is to be meaningful, the grand jurors who return an indictment must be informed of all of the evidence presented on the proposed indictment and must consider and evaludate that evidence. Otherwise, the grand jury cannot perform its function of determining whether an accusation is founded upon reason and supported by probable cause. See United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). Recognizing that problem, Judge Pregerson cogently stated in his opinion that "[j]urors who are ignorant of some of

the evidence presented to the grand jury cannot effectively question the validity of the prosecution's case." United States v. Leverage Funding, supra, 478 F.Supp. at 801.

Judge Pregerson's thoughtful opinion clearly demonstrates the necessity of standards for grand jury attendance. Judge Pregerson reasoned that, in order to maintain the fairness and independence of the grand jury, courts must ensure that grand jurors who vote an indictment be informed by having heard all exculpatory evidence and all noncumulative evidence presented to the grand jury on the proposed indictment. 478 F.Supp. at 802. However, if the only means of challenging the validity of a grand juror's vote were a demonstration that he or she had missed exculpatory or noncumulative inculpatory

evidence, courts would become involved in lengthy and burdensome analyses of evidence, a veritable morass. 478 F. Supp. at 803. In order to avoid the necessity for such analyses, Judge Pregerson adopted a "bright line rule" which simply requires that a grand juror who votes an indictment attend all grand jury sessions and hear all of the evidence presented to the grand jury on the proposed indictment, whether that evidence is inculpatory or exculpatory. 478 F.Supp. at 803.

As a result of the majority's reversal of Judge Pregerson's decision and its concurrent failure to establish attendance standards for grand jurors, a grand juror may vote upon an indictment without having heard <u>any</u> evidence presented in support of the charges, so long as each grand jury session was

attended by 16 grand jurors. As has been demonstrated, the majority's decision means that 7 of the 12 grand jurors who concur in an indictment can cast their votes without having heard any evidence in support of the charges.[2/]

Courts exercise their supervisory power over grand juries in order to prevent such gross abuses of the grand jury system. United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977). Judge Pregerson's simple requirement that a grand juror who votes an indictment

---

2/ Nothing in the Court's holding would prevent such drastic consequences. While the majority has stated that "courts must presume that grand jurors have properly performed their duties," at p. 648, such a presumption is meaningless where there is no standard of attendance by which grand jurors' performance of their duties can be measured.

must attend every grand jury session is a reasonable means of determining whether an indictment was returned by an informed grand jury. A less restrictive standard has been suggested in this Circuit, whereby absentee grand jurors would be permitted to vote if transcripts of the evidence received by the grand jury when they were absent are read aloud to them. United States v. Roberts, 481 F.Supp. 1385, 1388 (C.D. Ca. 1980).[3/] That was not done in the case at bar. The majority's decision establishes no standard whatsoever by which it may be determined whether an indictment was returned by an informed grand jury.

3/ The practice of reading aloud transcripts of prior testimony has been approved by the Ninth Circuit. United States v. Chanen, supra, 549 F.2d at 1311.

A comparison of petit juries and grand juries is instructive. It is well-established that a petit juror who has been absent when testimony is presented during a trial is disqualified from participating in the jury's deliberations. See United States v. Virginia Erection Corp., 335 F.2d 868, 870 (4th Cir. 1964). A petit juror who has not heard all of the evidence obviously cannot weigh that evidence to determine guilt or innocence.

Although a grand jury does not make a final adjudication of guilt or innocence, United States v. Calandra, supra, 414 U.S. at 343, 94 S.Ct. at 618, the grand jury's constitutionally mandated function of determining probable cause also entails important fact-finding obligations. The difference in the standard of proof before grand and petit

juries does not diminish the importance of grand jurors' attendance.

Moreover, there is no good reason why grand jurors should not be required to attend every grand jury session. Trial courts compel the perfect attendance of petit juries as a matter of course. In a lengthy trial, a petit juror's perfect attendance may well be a far more burdensome duty than would be the perfect attendance of a grand jury during the course of an investigation. Courts, in the exercise of their supervisory power over grand juries, clearly have the power to compel the attendance of grand jurors and should exercise that power.

In reaching its decision in the case at bar, the majority relied heavily upon the 36-year-old case of United States ex rel. McCann v. Thompson, 144 F.2d 604

(2d Cir.), cert. denied, 323 U.S. 790 (1944). That reliance is misplaced for several reasons.

First, McCann antedates many of the important constitutional developments of the past 30 years by which the rights of criminal suspects have won increased protection. In particular, McCann was decided nearly 20 years before the United States Supreme Court held in Wood v. Georgia, supra, that a grand jury must be informed in order to fulfill its function of protecting the innocent against unwarranted prosecutions. In fact, nowhere in McCann is there a discussion of that important protective function of grand juries.

Second, a major basis of the Second Circuit's decision in McCann was "the extreme difficulty of ever proving what was the evidence before a grand

jury." 144 F.2d at 607. That difficulty has been obviated by the 1979 amendment of Rule 6(e)(1), Federal Rules of Criminal Procedure, pursuant to which all grand jury proceedings are recorded, except when the grand jury is deliberating or voting. The historical notes by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, concerning the purpose of Rule 6(e)(1), demonstrate that the benefits to be derived from recordation include the preservation of testimony and the restraint of prosecutorial abuse before the grand jury.[4/] It is obvious that

---

4/ One type of prosecutorial abuse which may be restrained by the recordation requirement of Rule 6(e)(1) is the failure of the prosecution to present to the grand jury evidence negating the guilt of the accused. The obligation of a federal prosecutor to present such evidence is discussed, infra.

the recordation requirement also enables courts to determine with precision the evidence which was presented when grand jurors failed to attend particular grand jury sessions.

Third, the McCann opinion is contrary to the majority's holding that grand jurors need not be present when exculpatory evidence is presented to the grand jury. The Second Circuit acknowledged:

> "the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur; but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character. . ." 144 F.2d at 607. (Emphasis added.)

The above-quoted language suggests that the Second Circuit allows the

accused the opportunity to demonstrate that exculpatory evidence was presented to the grand jury at a time when not all of the grand jurors who voted for the indictment were present.[5/] The majority's decision goes far beyond McCann in holding that a grand juror may vote to indict without having heard any exculpatory evidence that was presented.

5/ It is important to note that the Second Circuit now requires prosecutors, in the interest of justice, to present to the grand jury any substantial evidence negating guilt, at least where that evidence might reasonably be expected to lead the grand jury not to indict. United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979).

B. The Majority's Holding That Prosecutors Are Not Required to Present to the Grand Jury Exculpatory Evidence in Their Possession Deprives the Grand Jury of its Historic Function of Protecting the Innocent Against Unfounded and Malicious Prosecutions.

By holding that prosecutors are not required to present exculpatory evidence to the grand jury, and that grand jurors need not be present to hear and consider such evidence even when it is presented, the majority deprives the grand jury of its traditional function of protecting the innocent. Exculpatory evidence is crucial to the determination of probable cause, because evidence which negates an element of the crime charged may cause the grand jury to determine that probable cause is lacking. Thus, in order to perform its function of determining probable cause,

the grand jury must consider all evidence which is relevant to that determination.6/

In reaching its decision, the majority has overlooked the fact that federal prosecutors are required, by the regulations of their agency, to present exculpatory evidence to the grand jury. Section 9-11.334 of the

---

6/ The Ninth Circuit has held, in United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828 (1976), that evidence in the prosecution's possession which tends to negate the guilt of the accused need not be presented to the grand jury. The opinion lacks both citations of authority and a full discussion of the Court's reasons for establishing a rule which so greatly limits the grand jury's ability to reach a fair decision. The holding in Hata, of course, does not bind this Court. In light of the importance of preserving the fairness of the grand jury system, the issue of presenting exculpatory evidence to the grand jury surely deserves fresh consideration by this Court.

United States Attorneys Manual, promulgated by the United States Department of Justice, provides, in pertinent part, as follows:

> "[W]hen a prosecutor conducting a grand jury is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such person." (Emphasis added.)

In addition, prosecutors are bound by ethical obligations to present to the grand jury evidence which negates guilt. Section 3-3.6 of the American Bar Association Standards for Criminal Justice Relating to the Prosecution Function (2d Ed. 1980) provides:

> "No prosecutor should knowingly fail to disclose to the grand jury any evidence which will tend substantially to negate guilt."

Section 3-3.6 has received judicial approval. United States v. Ciambrone, supra, 601 F.2d at 623; United States v. Gold, 470 F.Supp. 1336, 1353 (N.D. Ill. 1979).

Several courts have recently held that exculpatory evidence must be presented to the grand jury in order to preserve the proper functioning and fairness of grand jury proceedings.[7] United States v. Roberts, supra, 481 F. Supp. at 1390; United States v. Ciambrone, supra, 601 F.2d at 623; United States v. Gold, supra, 470 F.Supp. at

---

7/ Because of the ex parte nature of grand jury proceedings, in which the subject of the investigation lacks the assistance of counsel to ensure the fairness of those proceedings, it is as critical as it is at a trial that the fact finders be informed of evidence tending to demonstrate innocence. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

1353; United States v. Olin Corp., 465 F.Supp. 1120, 1127 (W.D. N.Y. 1979); United States v. Phillips Petroleum Co., 435 F.Supp. 610, 618 (N.D. Okla. 1977); United States v. Braniff Airways, Inc., 425 F.Supp. 579 (W.D. Tex. 1977); United States v. Mandel, 415 F.Supp. 1033, 1042 (D. Md. 1976); see United States v. DeMarco, 401 F.Supp. 505, 513 (C.D. Ca. 1975), aff'd on other grounds, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977).

CONCLUSION

Thus, the trend has been to increase the assurances that grand jury proceedings are conducted with fairness and objectivity. It is respectfully submitted this Court should establish grand jury attendance requirements

and establish standards of conduct for federal prosecutors before grand juries which are at least as stringent as the standards established by the Department of Justice for its employees.

Respectfully submitted,

RICHARD H. KIRSCHNER, Esq.
PAUL FITZGERALD, Esq.

By: RICHARD H. KIRSCHNER, Esq.

Attorneys for Petitioners

80-1707

Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

LEVERAGE FUNDING SYSTEMS, INC.,
a corporation,
CENTAUR FILMS, a corporation,
PETER S. TRAYNOR, an individual,
WILLIAM G. McDONALD, JR.,
an individual,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDICES FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD H. KIRSCHNER, Esq.
PAUL FITZGERALD, Esq.

RICHARD H. KIRSCHNER,
A Professional Corporation

10850 Wilshire Boulevard
Fourth Floor
Los Angeles, CA 90024
(213) 474-6555

Attorneys for Petitioners

INDEX TO APPENDICES

APPENDIX A — Opinion of United States Court of Appeals for the Ninth Circuit, decided October 3, 1980

APPENDIX B — Order Dismissing Indictment of the United States District Court, Central District of California, dated October 17, 1979

APPENDIX C — Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and for Rehearing En Banc, filed February 17, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Argued and Submitted May 7, 1980

Decided October 3, 1980

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
LEVERAGE FUNDING SYSTEMS, INC., a corporation, CENTAUR FILMS, a corporation, PETER S. TRAYNOR, an individual, WILLIAM G. McDONALD, JR., an individual,	)
	)
Defendants-Appellees.	)

No. 79-1677

Appeal from the United States District Court for the Central District of California

Before: FARRIS and NELSON, Circuit Judges, and JAMESON,* District Judge.

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

FARRIS, Circuit Judge:

The United States appeals the district court's dismissal of a 29-count indictment against Leverage Funding Systems, Centaur Films, Peter Traynor and William McDonald for mail fraud and fraud in the offer and sale of securities. The government contends that the district court erred in ruling that the indictment must be dismissed because fewer than twelve of the grand jurors returning the indictment attended every grand jury session. We reverse.

On February 27, 1979, the defendants were indicted by a federal grand jury on 29 counts of mail fraud and fraud in the offer and sale of securities in violation of 18 U.S.C. § 1341 and 15 U.S.C. §§ 77q(a) and 77x. At the defendants' request, the district court required the government to disclose the grand jury voting and

attendance records. Those records revealed that of the 19 grand jurors who unanimously voted to indict, 9 were present at all 13 grand jury sessions, 5 were present at 12 sessions, 2 were present at 11 sessions, 2 were present at 9 sessions, and the remaining juror was present at 6 sessions.

On September 5, 1979, the defendants moved to dismiss the indictment, contending that their Fifth Amendment rights were violated because fewer than 12 of the grand jurors who returned the indictment were present at every grand jury session. The district court agreed and dismissed the indictment, concluding that "an indictment is valid under the Fifth Amendment and Fed.R.Crim.P. 6(f) only if at least twelve jurors attend all sessions at which the grand jury

hears evidence on the proposed indictment." United States v. Leverage Funding Systems, Inc., 478 F.Supp. 799, 800 (C.D. Cal. 1979).

We do not question the necessity for an independent and informed grand jury. See Wood v. Georgia, 370 U.S. 375, 390-93, 82 S.Ct. 1364, 1373-74, 8 L.Ed.2d 569 (1962). The grand jury stands between the accusor and the accused and represents the primary security to the innocent against hasty, malicious and oppressive prosecution. Id. at 390, 88 S.Ct. at 1373. See also Branzburg v. Hayes, 408 U.S. 665, 686-88, 92 S.Ct. 2646, 2659-60, 33 L.Ed.2d 626 (1972). Whether this function can be performed by grand jurors who have not heard all the evidence presented by the prosecution is the subject of this dispute.

The identical question was before the Second Circuit in United States ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944). Judge Learned Hand, writing for the court, concluded:

> "Since all the evidence adduced before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote. Against this we can think of nothing except the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur; but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character, in spite of the extreme difficulty of ever

> "proving what was the evidence before a grand jury. Indeed, the possibility that not all who vote will hear all the evidence, is a reasonable inference from the fact that sixteen is a quorum."

Id. at 607. See also United States v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972). Although no other circuit has expressly decided the issue, we have cited McCann favorably. See Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951, 88 S.Ct. 1042, 19 L.Ed.2d 1142 (1968).

Our independent review leads us to the same result as that reached by the Second Circuit. The Fifth Amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury . . . ." This right is implemented by Rules 6(a) through 6(f) of the Fed.R. Crim.P. Rule 6(a) provides that a "grand jury shall consist of not less than 16 nor more than 23 members." Rule 6(f) provides that an "indictment may be found only upon the concurrence of 12 or more jurors." Neither the Fifth Amendment nor Rule 6(f) expressly states whether a grand juror must hear all the evidence presented before he or she can cast a valid vote for indictment.

This court must give effect to the express terms of Rules 6(a) and 6(f) unless such an interpretation would frustrate the purpose of the rules (i.e. implementation of the grand jury provision of the Fifth Amendment.) See, e.g., Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978); Commissioner

v. Brown, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965). A literal interpretation of Rules 6(a) and 6(f) indicates that an otherwise valid indictment will not be dismissed if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict. Nothing more is required unless the Fifth Amendment requires more.

Leverage Funding contends that the district court's ruling is correct. Otherwise, a juror who did not attend every session might have been absent during the presentation of exculpatory evidence. Leverage Funding apparently reasons that a grand juror can only fulfill his or her constitutional role

if he or she hears all the evidence, both inculpatory and exculpatory, which is presented by the prosecution. We disagree.

We understand Leverage Funding's concern, but the purpose of the grand jury indicates that a juror's absence during the presentation of exculpatory evidence is not a proper ground to invalidate that juror's vote for indictment. It is the function of the grand jury to determine whether the evidence presented in a specific case is sufficient to establish probable cause to believe that a crime was committed and that a specific individual committed the crime. Bracy v. United States, 435 U.S. 1301, 1302, 98 S.Ct. 1171, 1172, 55 L.Ed.2d 489 (1978); Costello v. United States, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). The grand jury is not to weigh evidence to determine

guilt or innocence. United States v. Salsedo, 607 F.2d 318, 319 (9th Cir. 1979). See United States v. Calandra, 414 U.S. 338, 343-44, 94 S.Ct. 613, 617-18, 38 L.Ed.2d 561 (1974). A grand juror can therefore fulfill his or her constitutional role of determining whether the prosecution has presented a prima facie case even if he or she was absent during the presentation of exculpatory evidence.

In any event, exculpatory evidence will rarely be presented to a grand jury. Because the grand jury's function is limited, the prosecutor has no duty to present evidence in his possession which tends to negate guilt. United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828, 97 S.Ct. 87, 50 L.Ed.2d 92 (1976). Further, an accused has no right to be called as a witness

before the grand jury that is considering his or her indictment, United States v. Salsedo, supra, and he or she has "no right of cross-examination, or of introducing evidence to rebut the prosecutor's presentation." United States v. Y. Hata & Co., supra at 512. A juror who is absent during a portion of the prosecution's case will, in all probability, miss only inculpatory evidence. See United States ex rel. McCann v. Thompson, supra at 607.

Leverage Funding also argues that a grand juror who is absent for one or more sessions might miss all the evidence presented by the prosecution in support of an indictment on a particular count. We understand that under the modern practice of presenting grand juries with complex multiple count indictments, Leverage Funding's concern might be valid in some cases. The issue, however, is whether, under the

Fifth Amendment, the possibility that an absent juror might not hear any evidence on a particular count is a sufficient basis to invalidate that juror's vote for indictment. We conclude that it is not.[1/]

The federal grand jury is an independent institution not relegated to a position within any of the three branches

---

1/ We recognize that the state of California follows a different rule. People v. Fujita, 43 Cal.App.3d 454, 476-77, 117 Cal.Rptr. 757, 771 (1974), cert. denied, 421 U.S. 964, 95 S.Ct. 1952, 44 L.Ed.2d 451 (1975), holds that twelve jurors voting to indict must have heard the substance of all the evidence. Fujita apparently reflects the special nature of California grand juries. Their function is to weigh all evidence presented, Cal. Penal Code § 939.7 (West 1970); prosecutors must present all known evidence favorable to defendants, Johnson v. Superior Court, 15 Cal.3d 248, 251, 539 P.2d 792, 794, 124 Cal.Rptr. 32, 34 (1975).

of government; it "'is a constitutional fixture in its own right . . ..'" United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977), quoting Nixon v. Sirica, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973). Federal courts exercise only a limited "supervisory power" over grand jury proceedings, United States v. Chanen, supra at 1313, and they have no authority to review the sufficiency of the evidence supporting an indictment. United States v. Samango, 607 F.2d 877, 880 n.6 (9th Cir. 1979). The Fifth Amendment bestows upon grand jurors a heavy responsibility, but lacking evidence to the contrary, courts must presume that grand jurors have properly performed their duties. See Ostrer v. Aronwald, 567 F.2d 551, 553-54 (2d Cir. 1977). Courts must also

presume that a grand juror who votes to indict an individual on a particular count has heard sufficient evidence to believe that a trial on that count is warranted. Id. Leverage Funding has cited no authority, and we have found none, which even suggests that the Fifth Amendment requires the abandonment of this presumption unless a grand juror has heard all the evidence presented by the prosecution.

Under the Fifth Amendment and Fed.R. Crim.P. 6(a) and 6(f), an indictment is valid if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict. Nothing requires that every juror voting to indict attend every session.

Reversed.

NELSON, Circuit Judge, dissenting:

I respectfully dissent. I would affirm and adopt the opinion of the district court judge, reported at 478 F.Supp. 799 (C.D. Cal. 1979).

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

October 17, 1979

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LEVERAGE FUNDING SYSTEMS, INC., a corporation, CENTAUR FILMS, a corporation, PETER S. TRAYNOR, an individual, WILLIAM G. McDONALD, JR., an individual,	)
	)
Defendants.	)

No. CR 79-159-HP

ORDER DISMISSING INDICTMENT

Before: PREGERSON, District Judge

The Fifth Amendment to the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury . . .." A grand jury consists of up to twenty-three persons, F.R.Crim.P. 6(a), sixteen constituting a quorum. 8 Moore's Federal Practice ¶ 6.02[2], at 6-17 (2nd ed. 1978); see 18 U.S.C. § 3321, F.R.Crim.P. 6(a). For a grand jury to indict, twelve or more jurors must vote to return an indictment. F.R. Crim.P. 6(f). Defendants' motion to dismiss the instant indictment requires the court to address two questions: (1) whether at least twelve of the grand jurors who vote to return an indictment must be informed of all the evidence presented to the grand jury, and (2) whether a grand juror can be considered informed without having attended all sessions at which evidence is presented on the proposed indictment. To preserve

the integrity of the grand jury system, the court rules that an indictment is valid under the Fifth Amendment and F.R. Crim.P. 6(f) only if at least twelve jurors attend all sessions at which the grand jury hears evidence on the proposed indictment. Because this requirement was not met, the indictment must be dismissed.

I. FACTUAL BACKGROUND

On February 27, 1979, a grand jury returned an indictment charging defendants with having committed various felonies under federal law. This grand jury met and heard evidence on thirteen separate days, beginning on May 9, 1978. At each session, sixteen or more jurors were present, out of the twenty that constituted the grand jury. On the thirteenth day, with nineteen jurors

present, the grand jury voted unanimously in favor of indictment. At first blush it would appear that the voting requirement of F.R.Crim.P. 6(f) was satisfied.

An examination of the grand jury attendance chart revealed, however, that of the nineteen jurors voting to return the indictment, only nine had attended each of the previous twelve sessions. The chart showed that ten jurors had missed one or more sessions and therefore were possibly unaware of some of the evidence when they voted. After this information was disclosed, defendants moved to dismiss the indictment. They asserted that only jurors fully aware of the evidence presented can be counted in determining whether the voting requirement of Rule 6(f) has been met. In response, the government asserted that

sixteen of the jurors--a quorum--were sufficiently aware of the evidence because seven of the absentee jurors missed evidence that was assertedly cumulative.[1/] As an alternative, the government also argued that the law does not require that there be a minimum of twelve informed jurors who vote to return an indictment.

II. THE NECESSITY OF AN INFORMED GRAND JURY

To resolve the issues raised, the court must look to the role the grand jury plays in our criminal justice system. Chief Justice Warren, writing for the Supreme Court in Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373,

---

1/ Government counsel indicated that on the day the grand jury voted to indict, he did not examine the attendance chart and was thus unaware which jurors had missed previous sessions.

8 L.Ed.2d 569 (1962), eloquently described the grand jury's historic role:

> "[T]his body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

(Footnote omitted.) See also Stirone v. United States, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Others who have observed the workings of the grand jury system paint a different picture. They say that today the grand jury is a mere servant of the prosecutor and that it does not act as a buffer between the accuser and the accused. They argue that it is the prosecutor who decides which matters will be put before the grand

jury, that it is the prosecutor who decides what evidence will be presented to the grand jury and thus what evidence will be ignored, and--practically and generally speaking--that it is the prosecutor who makes the ultimate decision as to who should be indicted for what. See generally M. Frankel & F. Naftalis, The Grand Jury 22-23 (1977).

There is perhaps a significant gap between the grand jury's historic role and the role the grand jury now plays in our criminal justice system. Of necessity, the grand jury must rely on the evidence presented to it by the prosecutor. Nevertheless, the grand jury has an important role to play, particularly at the federal level where the grand jury is the only potentially neutral body that can protect the individual against

the initiation of arbitrary or malevolent prosecutions. If such a prosecution is started, the innocent may be forced to suffer the serious economic and social harms resulting from the return of the indictment itself.

For the grand jury to fulfill its role as the independent buffer between the accuser and the accused, at least twelve grand jurors who vote to return an indictment should be informed of all the evidence submitted by the prosecutor. Jurors who are ignorant of some of the evidence presented to the grand jury cannot effectively question the validity of the prosecution's case. For example, a juror who missed all the testimony relating to count three of a particular proposed indictment obviously cannot question the validity of that proposed

count. In Wood, Chief Justice Warren aptly spoke of "[t]he necessity to society of an independent and informed grand jury . . . ." 370 U.S. at 390, 82 S.Ct. at 1373.

The Supreme Court's decision in Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), does not suggest a different result. In Costello, the Court held that an indictment based entirely on hearsay is valid, if returned by a legally constituted and unbiased grand jury. The Court examined the English origins of our constitutional grand jury and the history of grand jury practice in this country and noted that the grand jury has traditionally convened as a body of laymen free from technical rules of evidence. The Court approved this practice both because the grand jury was intended to operate substantially like its English

progenitor and because challenges based on evidentiary defects would produce burdensome delays in criminal proceedings. Thus, Costello stands only for the proposition that courts should not inquire into the substance of the evidence presented to the grand jury. Courts can still play a role, however, in ensuring the fairness and independence of that body. In re Grand Jury For November, 1974 Term, 415 F.Supp. 242, 244 (W.D.N.Y. 1976). By requiring that grand jurors be informed for their votes to count, this court is not evaluating the sufficiency of the evidence presented. Rather, it is acting to ensure that grand jury proceedings are conducted in a manner that is fair and independent.

The Second Circuit has taken the position, in United States ex rel. McCann v.

Thompson, 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944), and later in United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972), that it is irrelevant whether the grand jurors who vote an indictment are cognizant of all the evidence, except possibly where exculpatory evidence is introduced. In McCann, defendants argued that the district court should have dismissed the indictment because less than twelve who voted to indict had heard all the evidence. The Second Circuit rejected this argument, stating:

> "Since all the evidence before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearing will ordinarily merely weaken the prosecution's case. If what

> "the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote."

144 F.2d at 607. The Second Circuit further said:

> "Against this [reasoning] we can think of nothing except the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur; but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character."

Id.

This court cannot adopt the Second Circuit's view. The Second Circuit reasoned that it is not prejudicial for an absentee to vote to indict upon hearing only some of the evidence because the missed evidence which was also aimed

at proving guilt, would not have caused him to change his vote. As the Second Circuit indicated, this reasoning does not hold true where the missed evidence is exculpatory.[2/] The court, however, overlooked the fact that its reasoning also fails where the missed evidence was inculpatory but noncumulative. In such a situation, the absentee grand juror would be voting to indict without having heard evidence relating to elements of some of the crimes charged, or without

---

2/ Since 1977, Justice Department policy requires a prosecutor "in many circumstances" to present exculpatory evidence to the grand jury. For example, if a prosecutor is personally aware of substantial evidence that directly negates the guilt of the target of the investigation, the prosecutor must present that evidence to the grand jury before seeking an indictment. United States Attorneys' Manual, Title 9, § 9-11.334 (August 1, 1979). Ordinarily a prosecutor should also give the target the opportunity to testify before the grand jury. Id. at §§ 9-11.252-.253.

having heard evidence relating to entire counts of the indictment. Clearly, it is unfair to count that grand juror's vote as one of the twelve necessary to return an indictment.

Thus, the Second Circuit's reasoning arguably holds true only where the absentee grand juror misses cumulative inculpatory evidence. Here, the government made a painstaking analysis in an attempt to demonstrate that seven of the absentee jurors in fact missed only cumulative inculpatory evidence. But to allow challenges to jurors only where it can be showr that they missed exculpatory evidence, or noncumulative inculpatory evidence, would involve the courts in lengthy, burdensome analysis of the evidence presented to grand juries and would "bog down the courts in a morass, a veritable jungle of speculation and

conjecture." United States v. Colasurdo, 453 F.2d at 596. Such analyses would constitute the kind of preliminary trials that Costello warned against. Therefore, it is preferable to adopt a bright line rule that requires a court to discount the vote of an uninformed grand juror. Moreover, respect for the grand jury as an institution and basic notions of justice and fair play require that the vote of a grand juror be counted only when he is informed of all the evidence presented, irrespective of whether the missed testimony was cumulative or noncumulative. It is well established that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.

942 (1954).[3/]

Having established the necessity for informed jurors, the court now rules that to be considered an informed juror, one

---

3/ The one decision by the Ninth Circuit that addresses the informed juror question is ambiguous. In Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951, 88 S.Ct. 1042, 19 L.Ed.2d 1142 (1968), the defendant alleged that, at each grand jury session, more than sixteen but less than all the grand jurors were present. The court held that this allegation did not provide a basis for dismissing the indictment because: "Individual grand jurors comprising more than a quorum attended all sessions, and were present when the vote was taken on the indictment." Id. at 139. The use of the word "individual" suggests that, in Lustiger, the same sixteen (or more) individual jurors attended all grand jury sessions. Thus, one could argue that Lustiger holds that an indictment is valid only when a quorum of the grand jury is cognizant of all the evidence at the time of voting. On the other hand, after making the above quoted statement, the Ninth Circuit cited the Second Circuit's decision in McCann, prefacing the citation with the signal "see." This suggests an endorsement of the Second Circuit's position. Faced with these conflicting possible interpretations of the holding in Lustiger, this court does not find the case controlling here.

must attend all sessions at which evidence is presented on the proposed indictment. This requirement cannot be met by having absentee jurors read the transcripts of missed sessions.4/ The grand jury is a creature of the Constitution, entrusted with an important and powerful role in our criminal justice system. The grand jury's role is to stand as the buffer between the accuser and the accused. It performs this role when it

---

4/ Rule 6(e) of the Federal Rules of Criminal Procedure now requires that all grand jury proceedings, except for deliberations and voting, be recorded stenographically or by an electronic device. 47 U.S.L.W. 4488 (1978) (effective August 1, 1979). Though this Rule was not in effect when the grand jury heard the evidence in this case, the government nevertheless had the proceedings recorded. Even if a juror could be considered an informed juror by reading the transcripts of sessions missed, the absentee jurors here (with the possible exception of one juror) did not read the necessary transcripts.

is asked by the prosecutor to exercise its power to bring charges against individuals for serious crimes. Having this power imposes on the grand jury the responsibility to conduct its proceedings with the highest degree of fairness. An appearance of fairness is lacking when an indictment is voted by a grand jury lacking at least twelve members who have attended all sessions. Through their attendance at every session grand jurors not only inform themselves of the evidence but also demonstrate both to those under investigation and to society their commitment to analyze and act on that evidence in a reasoned and responsible manner.[5/]

5/ The court's holding is not at odds with the Ninth Circuit's decision in United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied 434 U.S. 825,
(Continued)

It has been argued that it is unduly burdensome to require that at least twelve of the jurors who vote to indict attend all grand jury sessions. United States ex rel. McCann v. Thomson, 144

5/(Continued)

98 S.Ct. 72, 54 L.Ed.2d 83 (1977). Chanen held that, in the circumstances of that case, the government could secure an indictment by reading transcripts of sworn testimony to the grand jury instead of presenting live witnesses. Cf. United States v. Helstoski, ___ U.S. ___, 99 S.Ct. 2432, 61 L.Ed.2d 12 (1979). In Chanen, it appears that each grand juror was present when all the evidence was offered on the proposed indictment. The Ninth Circuit was primarily concerned that courts should not interfere with the standard prosecutorial decisions concerning what evidence to present to the grand jury and how to present it. By requiring that grand jurors faithfully attend all sessions at which evidence is heard for their votes to count, this court's ruling does not interfere with prosecutorial discretion. Rather, this ruling aims to ensure that grand jurors faithfully attend all sessions at which evidence is heard so that the manner in which they arrive at their decision is fair.

F.2d at 607. This court believes, on the contrary, that the government can muster grand juries and schedule its cases with sufficient ease to allow it to adjust its procedures to comply with this decision.[6/] If grand jurors were told that their ability to cast a valid vote on an indictment hinges on their faithful attendance, then perhaps they would take their duties more seriously and appear at all sessions. It is not asking too much to require the faithful attendance of at least twelve out of

---

6/ There is no rule that limits the government in impaneling grand juries. On the contrary, F.R.Crim.P. 6(a) provides that grand juries shall be summoned "at such times as the public interest requires." F.R.Crim.P. 6(g) specifically makes the grand jury's tenure and power independent of the term of court. Thus, the government retains significant control in summoning grand juries and should be able to obtain the appropriate juror attendance.

twenty-three members of a constitutionally mandated body exercising great power over peoples' lives. To demand less casts a disparaging light on the grand jury as an institution and endorses an appearance of unfairness which has no place in our system of criminal justice.

Because the instant indictment was returned by less than twelve informed grand jurors--i.e., by less than twelve jurors who attended all grand jury sessions--the indictment must be dismissed. The court feels that dismissal is mandated if the Fifth Amendment's provision for indictment by a grand jury is to have any meaning.

THEREFORE, IT IS ORDERED that the indictment be dismissed without prejudice.

APPENDIX C

F I L E D

Feb. 17, 1981
Richard H. Deane
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. LEVERAGE FUNDING SYSTEMS, INC., a corporation, CENTAUR FILMS, a corporation, PETER S. TRAYNOR, an individual, WILLIAM G. McDONALD, JR., an individual, Defendants-Appellees.	)

No. 79-1677

DC No. CR 79-159-HP

ORDER

Before: FARRIS and NELSON, Circuit Judges, and JAMESON,* District Judge.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for rehearing en banc and Judge Jameson has recommended rejection of the same. Judge Nelson has voted to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

No. 80-1707

APR 24
ALEXANDER L.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVERAGE FUNDING SYSTEMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1707

LEVERAGE FUNDING SYSTEMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the charges against them should be dismissed (1) because fewer than 12 of the grand jurors who voted to indict attended all grand jury sessions and (2) because the government failed to present exculpatory evidence to the grand jury.

Petitioners were indicted in the United States District Court for the Central District of California on 29 counts of mail fraud and fraud in the offer and sale of securities, in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a), 77(x). At their request, the district court required the government to disclose grand jury voting and attendance records (Pet. App. A-2, A-3). Those records revealed that of the 19 grand jurors who unanimously voted to indict, nine were present at all 13 grand jury sessions, five were present at 12 sessions, and five others were present at between 6 and 11 sessions (Pet. App. A-3).

Petitioners moved to dismiss the indictment, contending that at least 12 of the grand jurors who vote to return an indictment must attend all sessions at which evidence is presented. The district court granted the motion and dismissed the indictment without prejudice (Pet. App. B-1 to B-21; 478 F. Supp. 799). The court of appeals reversed, one judge dissenting (Pet. App. A-1 to A-15; 637 F. 2d 645).

Petitioners now contend (Pet. 16-26) that the court of appeals erred in reinstating the indictment.[1] The court's ruling, however, is not a conviction. It places petitioners in precisely the same position they would have occupied if the district court had not dismissed the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present these contentions, together with any others they may have, to this Court in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature. See *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977).

We note in closing that the order of the district court dismissing the indictment was entered on October 17, 1979. Trial of this case had been delayed for more than a year and a half as a result. This Court should not further prolong this delay by undertaking interlocutory review.[2]

---

[1]Petitioners also contend (Pet. 27-31) that the government must present exculpatory evidence to the grand jury. But petitioners did not squarely present this claim to the district court and cite nothing in the record to suggest that the government did not follow its policy of presenting exculpatory evidence, even though not required to do so. See *United States* v. *Y. Hata & Co.*, 535 F. 2d 508 (9th Cir.), cert. denied, 429 U.S. 828 (1976).

[2]Since this case is interlocutory, we are not responding to the merits of petitioners' contentions. We will, of course, respond on the merits if the Court so requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04

No. 80-1707

MAY 29 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVERAGE FUNDING SYSTEMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Abney v. *United States*, 431 U.S. 651 2

Bracy v. *United States*, 435 U.S. 1301 7

Costello v. *United States*, 350 U.S. 359 ..... 4, 7

Loraine v. *United States*, 396 F. 2d 335, cert. denied, 393 U.S. 933 7

Lustiger v. *United States*, 386 F. 2d 132, cert. denied, 390 U.S. 951 6

Mills, In re, 135 U.S. 263 4

United States v. *Armored Transport, Inc.*, 629 F. 2d 1313, cert. denied, No. 80-948 (Mar. 2, 1981) 3

United States v. *Brown*, 574 F. 2d 1274, cert. denied, 439 U.S. 1046 7

United States v. *Calandra*, 414 U.S. 338 4

United States v. *Colasurdo*, 453 F. 2d 585, cert. denied, 406 U.S. 917 6

United States v. *Godoy*, No. CR 79-606(A) (C.D. Cal. Nov. 6, 1979) 6

United States v. *Lang*, Nos. 78-1557 *et seq.* (7th Cir. Apr. 2, 1981) 4, 6

United States v. *Pastor*, 419 F. Supp. 1318, aff'd, 557 F. 2d 930 6

United States v. *Roberts*, 481 F. Supp. 1385 6

United States v. *Ruyle*, 524 F. 2d 1113, cert. denied, 425 U.S. 934 7

Page

Cases—(Continued):

United States v. *Smith*, 552 F. 2d 257 7

United States v. *Y. Hata & Co.*, 535 F. 2d 508, cert. denied, 429 U.S. 828 ..... 2, 7

United States ex rel. McCann v. *Thompson*, 144 F. 2d 604, cert. denied, 323 U.S. 790 6

Constitution, statutes, and rules:

United States Constitution, Fifth Amendment 3, 4

15 U.S.C. 77q(a) 1

15 U.S.C. 77x 1

18 U.S.C. 1331 5

18 U.S.C. 1341 1

Fed. R. Crim. P.:

Rule 6 4

Rule 6(a) 3, 4, 5

Rule 6(f) 3

Rule 6(g) 5, 6

Miscellaneous:

United States Attorney's Manual 9-11.334 7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1707

LEVERAGE FUNDING SYSTEMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the charges against them should be dismissed because fewer than 12 of the grand jurors who voted to indict attended all grand jury sessions.

Petitioners were indicted in the United States District Court for the Central District of California on 29 counts of mail fraud and fraud in the offer and sale of securities, in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a), 77x. At their request, the district court required the government to disclose grand jury voting and attendance records (Pet. App. A-2 to A-3). Those records revealed that of the 19 grand jurors who unanimously voted to indict, nine were present at all 13 grand jury sessions, five were present at 12 sessions, and five others were present at between 6 and 11 sessions (Pet. App. A-3).

Petitioners moved to dismiss the indictment, contending that at least 12 of the grand jurors who vote to return an indictment must attend all sessions at which evidence is presented. The district court granted the motion and dismissed the indictment without prejudice (Pet. App. B-1 to B-21; 478 F. Supp. 799). The court of appeals reversed, one judge dissenting (Pet. App. A-1 to A-15; 637 F. 2d 645).

1. Petitioners contend (Pet. 16-26) that the court of appeals erred in reinstating the indictment.[1] The court's ruling, however, is not a conviction. It places petitioners in precisely the same position they would have occupied if the district court had not dismissed the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present these contentions, together with any others they may have, to this Court in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977).[2]

2. On the merits, the decision of the court of appeals is correct; moreover, it does not conflict with any decision of this Court or any decision of any other court of appeals. Notwithstanding the parade of undesirable consequences

---

[1]Petitioners also contend (Pet. 27-31) that the government must present exculpatory evidence to the grand jury. But petitioners did not squarely present this claim to the district court and cite nothing in the record to suggest that the government did not follow its policy of presenting exculpatory evidence, even though not required to do so. See *United States* v. *Y. Hata & Co.*, 535 F. 2d 508 (9th Cir.), cert. denied, 429 U.S. 828 (1976).

[2]We note that the order of the district court dismissing the indictment was entered on October 17, 1979. Trial of this case has been delayed for more than a year and a half as a result. This Court should not further prolong this delay by undertaking interlocutory review.

the petitioners assert may follow from the court of appeals' holding, the facts in *this* case do not justify their concerns. Fourteen of the grand jurors who voted to indict were present at all, or all but one, of the grand jury's 13 sessions. There is no evidence that the government withheld exculpatory evidence from the grand jury or presented such evidence at a time or in a way calculated to influence the smallest possible number of grand jurors. Under these circumstances, at least, further review by this Court is not warranted.

It is undisputed in this case that a quorum of the grand jury was present at every grand jury session and that a majority of the grand jurors voted in favor of petitioners' indictment, as is required by Rule 6(a) and 6(f) of the Federal Rules of Criminal Procedure. Petitioners' only complaint is that there were not 12 grand jurors who voted for their indictment who had perfect attendance records for the various grand jury sessions at whish evidence regarding petitioners was introduced. Nothing in the Rules of Criminal Procedure or any statute requires such a "perfect attendance" rule, and, as the court of appeals correctly held, the Constitution does not require any such rule either.

The Fifth Amendment provides, in pertinent part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *." While this guarantee ensures at least the individual petitioners the right to be indicted by a grand jury,[3] it does not specify any of the procedures that the grand jury must follow in determining whether to return an indictment. Traditionally, the grand jury has operated as a

---

[3]The Ninth Circuit has held that corporate defendants, such as petitioners Leverage Funding Systems, Inc., and Centaur Films, are not entitled to the protection of the Grand Jury Clause of the Fifth Amendment. See *United States* v. *Armored Transport, Inc.*, 629 F. 2d 1313 (9th Cir. 1980), cert. denied, No. 80-948 (Mar. 2, 1981).

relatively independent institution, charged with the responsibility of determining whether there is probable cause to believe that a particular suspect has committed a crime. See generally *United States* v. *Calandra*, 414 U.S. 338, 343-344 (1974). Moreover, while the Fifth Amendment requires that a prosecution for an "infamous crime" must be initiated by a grand jury, the grand jury itself is a creature of statute at least with respect to the provisions for its governance. See *In re Mills*, 135 U.S. 263, 267 (1890); *United States* v. *Lang*, Nos. 78-1557 *et seq.* (7th Cir. Apr. 2, 1981), slip op. 5. Thus, the principles governing the conduct of petit juries and the presentation of evidence at trial have not been—and should not be—imposed on the grand jury, as petitioners suggest. See *Costello* v. *United States*, 350 U.S. 359 (1956); *United States* v. *Calandra*, *supra*. In particular, because the grand jury's task is merely to determine, on the prosecutor's presentation, whether there is a prima facie case against a particular defendant, a grand juror need not have heard all of the evidence against a defendant in order to determine that probable cause has been shown. And, because grand jury investigations are frequently lengthy and cover many sessions, it would be impractical to require that the grand jurors be present at every session in order to be entitled to vote on an indictment.

Rule 6 of the Federal Rules of Criminal Procedure plainly contemplates that grand jurors need not be present for every session in an ongoing investigation in order to be entitled to participate. Rule 6(a) requires a quorum of only 16 jurors for every session—thus contemplating that as many as seven jurors may be absent from each grand jury session without impairing the validity of the proceedings. Under petitioners' argument, the quorum rule would be effectively undercut, since any grand jurors who were absent from a single session would no longer be entitled to cast a valid vote on any matter brought up at that session.

The quorum rule, however, was intended to serve the purpose of providing flexibility for the grand jury's operation, so that the grand jury could remain fully effective so long as 16 grand jurors were present at each session. Petitioners' proposed rule would add a significant qualification to the quorum rule: it would permit the grand jury to operate with as few as 16 members present, but only if at least 12 of those 16 had never been absent before. Rule 6(a) contains no such qualification, and in light of the purposes of the grand jury, there is no reason to impose such a qualification as a matter of constitutional construction.

Rule 6(g) provides even clearer support for the result reached by the court of appeals. That rule governs the discharge and replacement of grand jurors during the pendency of the grand jury's term. Recognizing the lengthy period that grand juries typically serve,[4] the Rule permits the court to replace grand jurors "for cause shown," when the need arises. The Rule clearly contemplates that the replacement process will enable the new jurors to serve in the place of—and with the same prerogatives as—the departed jurors. Yet under petitioners' proposed "perfect attendance" rule, replacement jurors would be rendered nearly useless with respect to any ongoing investigation. Because the votes of the replacement jurors would not be counted among the 12 needed to authorize an indictment, they would be "replacements" only in the sense that they could help to form a 16-member quorum at any given grand jury session; as a practical matter, their role in the grand jury's deliberations would be minimal. And if, in the course of a lengthy investigation, the court had to replace enough

---

[4]An "ordinary" grand jury may serve up to 18 months. See Fed. R. Crim. P. 6(g). A "special" grand jury may serve up to 36 months, much of which time may be spent on a single investigation. See 18 U.S.C. 3331.

jurors that fewer than 12 of the original jurors remained,[5] the grand jury would lose its power to indict altogether, and it would presumably have to be discharged. Rule 6(g) contemplates that the court will have the power to keep the grand jury in effect throughout its term; petitioners' proposed rule would undercut the effect of Rule 6(g).

Although petitioners argue that the federal courts are in conflict regarding the result reached here, there is in fact no such disagreement. The only two decisions to support the result urged by petitioner are the district court's decision in this very case—which, of course, was reversed by the court of appeals—and a similar ruling by the same district court (but a different judge) in another case. *United States* v. *Roberts*, 481 F. Supp. 1385 (C.D. Cal. 1980).[6] Both district court decisions have thus been disapproved and are of no continuing precedential value. More significantly, the only other courts of appeals that have addressed the issue presented here have agreed with the result reached by the Ninth Circuit. See *United States* v. *Lang, supra; United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (2d Cir.), cert. denied, 323 U.S. 790 (1944). See also *United States* v. *Colasurdo*, 453 F. 2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); *Lustiger* v. *United States*, 386 F. 2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *United States* v. *Pastor*, 419 F. Supp. 1318 (S.D.N.Y. 1975), aff'd, 557 F. 2d 930 (2d Cir. 1977).

Finally, petitioners argue that their proposed "perfect attendance" rule is constitutionally required because the prosecutor has a duty to present exculpatory evidence to a grand jury and because any juror who is not in attendance

---

[5]If the grand jury began with only 16 members, this would occur at the time the fifth replacement juror was named.

[6]Another case in the same district reached the result adopted by the court of appeals here. *United States* v. *Godoy*, No. CR 79-660 (A) (C.D. Cal. Nov. 6, 1979).

when such evidence is presented should not be permitted to make a judgment as to whether there is probable cause to believe the defendant has committed a crime. While the rule appears to be that a prosecutor has no such constitutional obligation,[7] this argument fails for a more fundamental reason. It overlooks the fact that a grand jury does not sit "to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial." *Bracy* v. *United States,* 435 U.S. 1301, 1302 (1978) (Rehnquist, J., in chambers). Because of this limited function, and because the grand jury is an ex parte proceeding, exculpatory evidence will seldom be presented to the grand jury. Yet this does not invalidate the grand jury's indictment. The protection against unfair conviction is provided primarily by the adversary proceeding before the petit jury. As this Court stated in *Costello* v. *United States, supra,* 350 U.S. at 363 (footnote omitted):

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.

---

[7]See *United States* v. *Y. Hata & Co., supra; Loraine* v. *United States,* 396 F. 2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968); *United States* v. *Ruyle,* 524 F. 2d 1133, 1136 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *United States* v. *Smith,* 552 F. 2d 257 (8th Cir. 1977); *United States* v. *Brown,* 574 F. 2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978). The Department of Justice, however, has adopted internal regulations requiring that federal prosecutors present exculpatory evidence to the grand jury if that evidence "directly negates the guilt of a subject of the investigation." *United States Attorney's Manual* 9-11.334.

Thus, even if one or more of the grand jurors has been absent from a session at which some evidence favorable to the defendant has been presented, that should not be sufficient to disqualify the grand juror and disable the grand jury from discharging its obligation of determining if there is probable cause to believe the defendant has committed a crime.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

---

[8]It is worth noting that because at least 16 grand jurors must be present at any session, at least 16 will be exposed to any exculpatory evidence presented at any session. Absent an extraordinary number of replacements of grand jurors, that provides a substantial assurance that the bulk of the jurors voting on the indictment will have heard the exculpatory evidence. Because the grand jury is a collegial body that can be expected to discuss among its members any cases regarded as close, the essence of any exculpatory evidence is likely to be communicated even to those members who may have been absent when the exculpatory evidence was presented.